

CAPITAL PUNISHMENT STATUTES AFTER FURMAN

In June 1972 the Supreme Court declared in the case of *Furman v. Georgia*¹ that the death sentence which had been imposed on some six hundred men and women convicted of capital offenses had to be reduced to a lesser punishment. Rather than resolving the controversy over capital punishment, however, this 5-4 decision only prompted attempts by most state legislatures to *salvage* some type of death penalty.

Courts, legislatures, and commentators alike have since concluded that the decision in *Furman* applied to all then-existing capital punishment statutes² except the few which required a death sentence upon conviction for a capital offense. It has been generally assumed that the holding of the majority does not extend beyond the kind of statutes which allowed either the judge or the jury discretion to impose capital punishment. However, while it is true that statutes which permitted this kind of unchecked discretion were particularly offensive to the justices of the majority, the concern expressed throughout their opinions that the death penalty was not being uniformly imposed extends to the entire capital punishment process.

In short, each justice concluded that untrammelled discretion allowed, and indeed maximized, the probability that the harshest punishment would be imposed selectively on a very few offenders, and thus not be applied uniformly to all those for whom it was a possible penalty. This selectivity led the justices to declare that the death penalty as it was being imposed was unconstitutional under the cruel and unusual punishment clause of the eighth amendment.³ But to eliminate discretion in the actual sentencing process would leave elements of discretion still existing in many other phases of the capital punishment system. These facets include the authority of the prosecutor to charge offenders as he sees fit and to decide whether and how much physical evidence (such as color pictures of the deceased) he will introduce, the authority of the

¹ 408 U.S. 238, 239 (1972): "[T]he imposition and carrying out of the death penalty in [these cases] constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Obviously, this decision actually invalidated only the death sentences for the three petitioners then before it. The court quickly extended its ruling, however, to cover all petitioners in like predicaments. For a survey of this process, see Note, *Remains of the Death Penalty—Furman v. Georgia*, 22 DEPAUL L. REV. 481 (1972).

² The following states had completely abolished the death penalty prior to the decision: Alaska (1957), Hawaii (1957), Iowa (1965), Minnesota (1911), Oregon (1964), West Virginia (1965), and Wisconsin (1853).

³ U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Robinson v. California*, 370 U.S. 660 (1962), explicitly held that the eighth amendment applied to the states through the fourteenth.

jury to convict for a lesser degree of homicide, the widely varying competence of defense counsel, and the constitutional prerogative of the governor to commute death sentences to life imprisonment. The uneven exercise of discretion, which is the crux of the majority opinions in *Furman*, remains in all of these aspects. Thus any analysis of these opinions which relies solely upon the sentencing discretion avoids the essence of the decision.

This note will examine the capital punishment process by illustrating how the discretionary aspects enumerated above functioned prior to the *Furman* decision. It will show that *Furman* requires either the abolition of these discretionary facets or, if that proves impossible, the abolition of capital punishment itself. Finally, it will analyze the nineteen statutes passed in the intervening two years to determine whether they follow the Supreme Court's mandate. It will attempt to demonstrate that the legislatures have done no more than simply shore up their capital punishment schemes by curtailing judge and jury discretion. Since the discretion within other phases has not been eliminated, the Supreme Court's requirement of uniformity in the imposition of the death penalty has not been satisfied.

I. TRADITIONAL DISCRETIONARY ASPECTS IN THE IMPOSITION OF CAPITAL PUNISHMENT

In contrast to the English practice which, up to the nineteenth century, prescribed the death penalty for nearly 250 crimes, the number of capital offenses in the United States has never exceeded forty.⁴ Therefore, while much of the early reform movement in England concentrated on reducing the number of capital crimes, this kind of limitation was accomplished with little effort in America.⁵ Instead, four major reforms in America were undertaken to revise both the method of sentencing and the modes of execution. These included introducing electrocution and gas for the execution (replacing hanging or shooting), substituting private for public executions, revamping the murder statutes into degrees of murder in order to make only first degree murder a capital offense, and allowing the jury (or judge) to decide whether or not to impose the death penalty.⁶ All of these were originally instituted in the hope of re-

⁴ The most common capital offenses were murder, treason, kidnapping, rape, carnal knowledge, robbery, bombing, assault with a deadly weapon by a life term prisoner, train wrecking, burglary, arson, perjury in a capital case, and espionage. First degree murder, in turn, was the most common conviction for a capital offense. For a general survey of the capital punishment system within the United States see H. BEDAU, *THE DEATH PENALTY IN AMERICA* 1-52 (1967) (hereinafter cited BEDAU).

⁵ *Id.*

⁶ *Id.* at 15.

stricting the use of the death penalty as a preliminary step towards total abolition. The latter two reforms, however, became major stumbling blocks in the movement for abolition, in that their selective use so significantly reduced the number of executions that the public was able to tolerate capital punishment because of its infrequent imposition.⁷ The following sections will analyze the effects both of the division of murder into degrees and of the sentencing discretion of judge and jury. In addition, two other major factors allowing uneven results in the imposition of the death penalty will be discussed: the governor's power of commutation and the competency of defense counsel.

A. *Degrees of Murder*

Since almost all defendants in capital trials in this country are accused of murder, the discretionary aspects involved in the sentencing and conviction processes for this crime constitute a major portion of the entire capital punishment scheme. England has never formulated the distinctions between first and second degree murder that are now commonplace in the United States. The first state to initiate this distinction was Pennsylvania, which in 1794 enacted the statute which was to become the model for the other states.⁸ "Malice," the English criterion for murder, was subdivided into categories. First degree murder, the capital offense, was characterized as willful, deliberate or premeditated killing, or as a killing during the commission of another specified felony. All other murders were second degree, non-capital offenses. This demarcation brought two major discretionary aspects into the criminal justice system: the discretion of the jury to designate the type of murder for which it found the defendant guilty, and the discretion of the prosecutor in his deciding how to charge the defendant.

1. Discretion of the jury in choosing the degree of murder in its verdict

The division of murder into degrees results in an uneven application of the death penalty for two basic reasons: (1) the difficulty of dis-

⁷ *Id.* See also Goldberg and Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1791 (1970) (hereinafter cited as Goldberg).

⁸ BEDAU, *supra* note 4, at 24:

[A]ll murder, which shall be perpetrated by means of poison, or by lying in wait, or by any other kinds of wilful, deliberate and pre-meditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury, before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree

...

tinguishing conceptually between first and second degree murder; and (2) the uncontrolled discretion of the jury in deciding which degree is appropriate for each defendant.

With respect to the first problem, various authorities have noted the inherent difficulty in attempting to differentiate between first and second degree murderers. For instance, when it was proposed to the Royal Commission on Capital Punishment that England should institute some type of degree formulation for the crime of murder, the Commission rejected such a classification, in part because of the impossibility of discriminating between those who might merit the death penalty and those who might not.⁹

Furthermore, the Commission found that the obscure definition of premeditation prevented any consistent or intelligible application of the concept by anyone, including a jury.¹⁰ Likewise, the drafters of the Model Penal Code have found these designations of first and second degree murders to be inappropriate because they are incapable of precise application:

The reason is that we are thoroughly convinced that neither premeditation and deliberation nor the fact that the homicide occurred in the commission of a felony included in the typical enumeration provide criteria which include all homicides that arguably should be dealt with by the highest sanction or exclude all homicides that should not be.¹¹

Thus the imprecision and complexity of the concept of premeditation made an even-handed usage of that criterion impossible. This factor was aggravated by the unfettered power of the jury in choosing the degree in its verdict.

Most of the statutes demarcating degrees of murder had a concomitant provision that the jury was to designate the degree of murder for which it found the defendant guilty. The Supreme Court in *Winston v. United States*¹² explicitly upheld the jury's role in choosing the degree as a proper exercise of the powers conferred upon it by the legislatures. The Court emphasized that

the steadfastness with which the full and free exercise by the juries of powers newly conferred upon them by statute in this matter has been

⁹ ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT 173-174 (Great Britain, 1953). (hereinafter cited as ROYAL COMMISSION).

¹⁰ *Id.* at 174-184. A similar problem exists if there is a requirement of "purpose" as an element of first degree murder. For an example of an obvious misapplication of this criterion see *State v. Salter*, 149 Ohio St. 264, 78 N.E.2d 575 (1948), as discussed in L. Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 CASE W. RES. L. REV. 512, 530 (1964).

¹¹ MODEL PENAL CODE § 201.6, Comment (Tent. Draft. No. 10, 1959).

¹² 172 U.S. 303 (1899).

upheld and guarded by this court as against the possible effect of any restriction or omission in the rulings and instructions of the judge presiding at the trial.¹³

It is improbable, however, that this function was performed by the jury with a full understanding of the law. Whether any jury could comprehend the confusing and varied sets of instructions arising from the statute is subject to real doubt.¹⁴ Even when they have understood them, it is unknown how often juries have ignored the words of the statutes and allowed extraneous considerations and emotions to enter into their determinations of when to mete out the most serious verdict.

There is evidence of a substantial disparity between the offense with which a defendant is charged and the offense for which he is ultimately convicted. For instance, in 1972, of the 2,853 persons charged within the general category of murder and negligent manslaughter, 37.4 percent were found guilty of the offense charged, while 20.8 percent were convicted of a lesser offense.¹⁵ The Ohio Legislative Service Commission concluded, on the basis of a study on the imposition of the death penalty between the years 1949 and 1958, that (comparing the number of homicides committed to the number of executions) the death penalty was administered in a "highly selective manner."¹⁶ Based on evidence presented at hearings, the Royal Commission indicated a similar conclusion.¹⁷ And at least one commentator has stressed that:

Some juries find second degree despite the facts and the judge's instructions; other juries, more conscientious than merciful, find first degree where warranted; still others muddle through the "mystifying psychology" to a bewildered finish. In conjunction with the death penalty, these degrees of murder have created a combination which tends to produce a most haphazard application of the criminal law in capital cases.¹⁸

Thus the creation of degrees of murder which are indistinguishable in theory and in practice, in combination with the tendency of juries to convict on the basis of emotional reaction rather than on the basis of a legislative judgment, has helped to produce an uneven application of the death penalty.

¹³ *Id.* at 312.

¹⁴ B. CARDOZO, *LAW AND LITERATURE* 99-101 (1931).

¹⁵ 1972 Uniform Crime Reports 113, (1972).

¹⁶ OHIO LEGISLATIVE SERVICE COMMISSION, *CAPITAL PUNISHMENT* 50-54 (Staff Research Report No. 46, Jan. 1961) (hereinafter cited OHIO LEGISLATIVE SERVICE COMMISSION). The Commission determined that only "one out of 3.6 persons charged with first-degree murder is found guilty of that offense."

¹⁷ ROYAL COMMISSION, *supra* note 9, at 181-189.

¹⁸ Ehrmann, *The Death Penalty and the Administration of Justice*, in BEDAU, *supra* note 9, at 429.

2. Prosecutorial discretion

It is manifest that the discretion of the prosecutor to decide not only *whether* an offender should be prosecuted, but also *what degree* of criminal activity he should be prosecuted for is virtually uncontrolled (and perhaps uncontrollable). Defendants who have attempted to assert an abuse of this discretion as a basis for an equal protection or due process defense have met with little success.¹⁹ The practice has been severely criticized not only because it has led to the prosecution of some defendants on the basis of their notoriety or the prosecutor's desire for political gain, but also because it has led, in the case of some offenders, to no prosecution at all. This inconsistent treatment of the total class of offenders is immune to correction, for neither the defendant nor the public has effective power to question the prosecutor's exercise of discretion.²⁰

The rationale for prosecutorial discretion is that it is useful in plea bargaining situations, it prevents a clogging of the court system, and it allows the consideration of important litigational factors, such as the most effective use of public resources to obtain the greatest number of convictions. Suggestions have been made that it is possible and desirable to develop objective standards to control this discretion.²¹ Whether or not such discretion can be effectively curtailed, to this point at least there have been no legal steps taken to do so. Yet the very existence of this kind of discretion effectively prevents uniformity within the criminal justice system, despite whatever steps are taken elsewhere to restrict other types of discretion.

The problems become especially acute in the capital punishment process because the prosecutor's charge is the first step towards execution. If the prosecutor chooses to charge second degree murder, then he has eliminated at the outset the possibility of that defendant's incurring the death penalty.²² In any given situation, however, it is open to debate whether the prosecutor's choice has been based on permissible legal factors or on impermissible personal value judgments. The evidence on the actual abuse of this particular facet of the capital punishment process is meager. Considering the enormous potential for plea bargaining

¹⁹ See, e.g., *Hutcherson v. United States*, 345 F.2d 964 (D.C. Cir. 1965). *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967).

²⁰ K. DAVIS, *DISCRETIONARY JUSTICE* 190-191 (1969).

²¹ Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1 (1971); see also Note, *Prosecutorial Discretion—a Re-Evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse*, 21 DEPAUL L. REV. 485 (1971).

²² See, e.g., TEX. CODE CRIM. PROC. ANN. art 1.14 (1966), which specifically allowed the prosecuting attorney to single out the defendants for which the death penalty would be sought by requiring the filing of notice of intention within a certain time period.

n this context (*i.e.* charges for first degree murder carry the possibility of the death penalty, whereas charges for second degree murder carry no possibility of the death penalty), it is likely that the effect of this discretion has been to force some defendants who should never have been charged with first degree murder to plead guilty to escape execution, and to reprieve other defendants whose crimes warrant a first degree charge by initially charging them with second degree murder.

The Royal Commission found that "the legal definition of first degree is far from satisfactory and in practice it is often ignored by prosecuting authorities, with the acquiescence of Judges, and by juries."²³ Other factors, such as possible race or class discrimination are difficult to establish because of the tremendous bulk of records (as well as their inadequacy) that would have to be perused. Nevertheless, since such discrimination is evident at the top of the pyramid (number actually executed out of the total possible),²⁴ there is no reason for supposing that such abuse does not occur at the base as well. Although the instances of this kind of abuse of discretion are inestimable, it cannot fairly be contested that it has been a source of the uneven imposition of the death penalty.²⁵

Thus the division of murder into degrees, joined with the power of the prosecutor and then the jury to choose the degree for which a defendant will be punished, has been a significant cause of the arbitrary infliction of the death penalty.

3. *Competency of Defense Counsel*

It is self-evident that the more effective and competent one's counsel, the greater one's chance of either obtaining an acquittal or minimizing punishment. The effectiveness of counsel may in fact be a major determinant in the outcome of a case. Since the trial judge and the appellate courts rarely oversee the capabilities of counsel, the judicial system provides little opportunity to rectify inequitable results arising from this source unless the incompetence is apparent from the record.²⁶ While this facet of the capital punishment process is not "discretionary" as the

²³ ROYAL COMMISSION, *supra* note 9, at 189.

²⁴ See, e.g., Wolfgang, Kelly, and Nolde, *Executions and Commutations in Pennsylvania*, in BEDAU, *supra* note 4, at 474; Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964).

²⁵ Goldberg, *supra* note 7, at 1792-1794.

²⁶ See, e.g., *People v. McDowell*, 69 Cal.2d 737, 447, P.2d 97, 73 Cal. Rptr. 1 (1968), where the defense counsel's obvious misunderstanding of particular issues was sufficient for reversal of the conviction. But see *Vizcarra-Delgadillo v. United States*, 395 F.2d 70 (9th Cir. 1968), where allegations based on the investigative phase of a criminal case were an insufficient claim for a violation of due process.

term has been used here, it does allow uneven application of the death penalty.

The evidence for the proposition that the varying competency of counsel produces inconsistent results is not overwhelming, but significant correlations have been obtained in some studies. One such study involved a comparison of case dispositions for defendants who have privately retained counsel and those who have court-appointed counsel.²⁷ For example, the Ohio Legislative Services Commission found that 44.4 percent of those with private counsel received commutations from the governor while only 30.6 percent of those with public counsel received commutations.²⁸

This factor may not be as crucial in yielding an arbitrary application of the death penalty as other factors such as prosecutorial discretion. Nevertheless, any characteristic of the capital punishment process which allows a non-uniform application of that penalty is inconsistent with the constitutional requirement of non-arbitrary imposition of the death penalty.

C. Judge and/or Jury Sentencing

It has been noted that the most obvious form of discretion—that is, the one that allows the greatest leeway in the application of the death penalty—is the statutory provision (common to nearly all states prior to *Furman*) which allows either the jury or the judge to designate the penalty.²⁹ In part, this provision was originally intended by the legislatures to allow judges and juries to extend mercy to certain defendants despite the fact that their crimes technically required conviction and imposition of the death sentence.

²⁷ It should be emphasized that the presumption here is *not* that court-appointed counsel are inherently less qualified than retained counsel. Rather, the demands on their time and resources are such that they cannot be as well prepared nor as able to follow each case and therefore be as effective as retained counsel.

²⁸ OHIO LEGISLATIVE SERVICES COMMISSION, *supra* note 17, at 63-64. See also Wolfgang, *et al.*, *supra* note 24, at 482-84. The latter study noted a similar statistical difference; however, it was also significantly related to the race factor—leaving the actual effect of having court-appointed counsel undetermined.

²⁹ California and Georgia had typical statutes allowing jury discretion. CAL. PENAL CODE § 190 (West 1970): "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the court or jury trying the same. . . ." GA. CODE ANN. § 26-1302 (1968): "The crime of rape shall be punished with death, unless the defendant is recommended to mercy by the jury, in which case the punishment shall be for not less than one nor more than twenty years." All states which had a murder statute carrying the death penalty had a similar provision for jury or judge sentencing.

1. Jury discretion

Since its inception in the early nineteenth century, discretionary sentencing by the jury has been incorporated within the capital punishment systems of most states. Discretionary sentencing has been fostered by the inability of legislatures to define the crimes, or offenders that deserved the death penalty, as well as by a lingering fear that juries might otherwise acquit defendants for whom they find death inappropriate (jury nullification).

Thus after the Supreme Court explicitly upheld the jury's right to exercise this kind of discretionary function in *Winston v. United States*,³⁰ it continued to sustain such a right, without intensive examination of its potential for abuse, through 1968: "The Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which the jury recommends it is an entirely legitimate one."³¹ Because it is nearly impossible, in most cases, to determine the actual foundation for a jury's decision,³² this principle of unfettered discretion provided for little remedial correction of abuses. Clearly, however, this authority allowed juries to designate the death penalty whenever they wished. In practice, it functioned as a means of radically reducing the number of people ultimately executed to a small minority—especially in the twentieth century.³³ In a study of the practice in North Carolina during the years 1938-1953, it was shown that only 21.8 percent of those convicted of first degree murder were committed by jury decision to death row.³⁴ Whether or not this authority was used in a discriminatory fashion among identifiable classes, it is evident that it allowed highly disparate sentences to be given to different individuals.

2. Judicial discretion

In several states, the legislatures decided that the ultimate decision on capital punishment should rest with the judge. Statutes in such states generally allowed the jury to recommend a sentence which the judge could either accept or reject, as he saw fit.³⁵ The Supreme Court up-

³⁰ 172 U.S. 303, 310 (1899); see also *Calton v. Utah*, 130 U.S. 83 (1889).

³¹ *United States v. Jackson*, 390 U.S. 570, 582 (1968).

³² *People v. Hines*, 61 Cal. 2d, 164, 169, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964).

³³ In 1935, there were 199 executions in the United States. In 1965, even before the moratorium got underway, there were seven.

³⁴ Johnson, *Executions and Commutations in North Carolina*, in BEDAU, *supra* note 4, at 453. Further, 13.6 percent of the convicted rapists, six percent of the first degree burglars and one percent of the arsonists were sentenced to die.

³⁵ See, e.g., N.Y. PENAL LAWS § 1045 (McKinney 1909) (as quoted in *Williams v.*

held such a procedure in *Williams v. New York*³⁶ as a proper method of ensuring the individualization of punishment in accordance with the judge's traditional role as the sentencing agent. As for the possibilities of abuse, the Court remarked: "But in considering whether a rigid constitutional barrier should be created, it must be remembered that there is a possibility of abuse wherever a judge must choose between life imprisonment and death."³⁷

It was the presumption of such statutes that the judge was able to exert a rational influence on the choice of penalty, based on his experience and legal training. It has been demonstrated in other areas of sentencing, however, that there has traditionally been a notable lack of uniformity of sentencing procedures among trial judges.³⁸ It has been surmised that this wide variance is not due to a difference in cases or offenders but rather is a result of differences in the backgrounds of the judges.³⁹ In other words, judges often sentence on the basis of their personal value judgments regarding the seriousness of the crime or the moral iniquity of the defendant, and not on any objective standard based either on legislative judgments or on the welfare of society. Since these value judgments lead to inconsistent sentences among similar defendants, it is evident that judges as well as juries abuse the discretionary power to sentence.⁴⁰

D. Governor's Power to Commute

Executive clemency is virtually an unrestricted power. Generally, the power is conferred by state constitutions, thus preventing the legislatures from encroaching on the governor's authority.⁴¹ Even in states which

New York, 337 U.S. 241, 242 (1948): "Murder in the first degree is punishable by death, unless the jury recommends life imprisonment. . ." § 1045-a: "Upon such recommendation, the court may sentence the defendant to imprisonment for the term of his natural life."

³⁶ 337 U.S. 241 (1949).

³⁷ *Id.* at 251.

³⁸ For a statistical evaluation of the irrational imposition of other penalties, see Glueck, *Predictive Devices and the Individualization of Justice*, 23 LAW & CONTEMP. PROB. 461, 465 (1958).

³⁹ *Id.* See also Gaudet, Harris and St. John, *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. C. & P. S. 811 (1933); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L. C. & P.S. 333 (1962).

⁴⁰ As to the concurrence of judges and juries, see Kalven and Zeisel, *The American Jury and the Death Penalty*, 33 U. CHI. L. REV. 769 (1966). The authors emphasized that despite the fact that the judge and jury agreed on the penalty in 81 percent of the cases studied, the factors that led to divergent decisions were highly disparate.

⁴¹ See, e.g., CAL. CONST. art 5, § 8: "Subject to application procedures provided by statute, the Governor, on conditions he deems proper, may grant a reprieve, pardon and commutation, after sentence, except in case of impeachment." See also Note, *Executive Clemency*, 39 N.Y.U. L. REV. 136, 143 (1964).

have designated that a Board of Pardons have this authority (either alone or in conjunction with the governor), its use remains entirely discretionary. The few restrictions that have been placed on the commuting power have not included objective standards for determining when it should be exercised; the governor or the board can consider any type of criteria in making the clemency decision.⁴² Most states provide for some type of investigation and hearing process; however, these provisions are not comparable to the strict procedural due process standards which have been established for criminal trials. For instance, defendants are rarely permitted to attend their own hearings. There are no set procedures for conducting these hearings, and only such evidence is received as is determined appropriate by the presiding official—either the governor or the Chairman of the Board of Pardons.

Moreover, the reasons for granting or denying clemency in any given case are either kept within the confines of the governor's office or publicized only through a recital of generalities.⁴³ Thus the possibilities, and indeed probabilities, for arbitrary use of the clemency authority are conspicuous. Nevertheless, it would be as difficult for a convicted defendant to show actual abuse in this area as it would be to fashion a remedy, since there is no higher authority to petition.

Various studies have challenged the traditional assumption that the clemency prerogative is used rationally. One such study concluded that "consistency, certainty and principles are lacking."⁴⁴ This is not to say that valid factors, such as the disparity of sentences for felony murder and the nature of the crime,⁴⁵ have not been applied as well. The fact remains, however, that the clemency power is subject to abuse and to capricious application both from changes in administration and from a lack of promulgated standards.⁴⁶ Thus the clemency authority is an important factor in the arbitrary imposition of the death penalty. Moreover, since this power arises from state constitutions, legislative enactments on the death penalty will have no effect on the use of this authority.

All of these discretionary aspects of the capital punishment process form the context in which *Furman* was decided. All were presumed to be necessary as methods to achieve individualization and extend mercy

⁴² *Id.* at 143-46.

⁴³ *Id.* at 158.

⁴⁴ Johnson, *Executions and Commutations in North Carolina*, in BEDAU, *supra* note 4, at 463. There were significant correlations between commutation and the race and occupational status of offenders. Moreover, of the men executed, 49.6 percent had no previous prison record; and only 15.9 percent of those executed had a significant prior criminal history.

⁴⁵ Note, *Executive Clemency*, 39 N.Y.U. L. REV. 136, 159-76 (1964).

⁴⁶ Goldberg, *supra* note 7, at 1792.

in the actual implementation of the statutes. In practice, however, the system had two main results: (1) since the major responsibility for applying the statutes was placed on jurors, judges, prosecutors, and governors, the legislatures had little incentive to undertake any review of the system of capital punishment; and (2) since so many areas of substantial discretion were allowed to coexist, capricious and arbitrary selections became unavoidable.

II. FURMAN AND ARBITRARINESS

The argument that convinced a majority of the Supreme Court that the death penalty was unconstitutional was, simply stated, that the capricious use of the death penalty made it cruel and unusual. Various components of this argument have been in the literature on capital punishment for years; at its core lies the concept of due process:

And due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice. . . . The power of the State must be exerted within the limits of those principles, and its exertion cannot be sustained when special, partial and arbitrary.⁴⁷

Since the arbitrary exercise of governmental power is constitutionally impermissible, the question then becomes: What constitutes an arbitrary exercise of power? In assessing individual punishments, the question is particularly difficult. Although *In re Kemmler*⁴⁸ indicated that uniformity among penalties was an essential part of the due process clause of the fourteenth amendment,⁴⁹ *Howard v. Fleming*⁵⁰ effectively abrogated such a goal by holding that "[u]ndue leniency in one case does not transform a reasonable punishment in another case to a cruel one."⁵¹ In this way, the criterion of uniformity under the cruel and unusual clause was laid to rest for seventy years until sufficient factual data could be mustered to show that the custom of imposing capital punishment had become completely unreasoning.

The effect of this irregular imposition had been noted fleetingly by writers in their general discussions concerning the death penalty. While

⁴⁷ *Caldwell v. Texas*, 137 U.S. 692, 697-98 (1890).

⁴⁸ 136 U.S. 436 (1890).

⁴⁹ [A]nd in the administration of criminal justice, [the Amendment] requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences.

Id. at 449.

⁵⁰ 191 U.S. 126 (1903).

⁵¹ *Id.* at 136.

explaining the power of the Home Secretary to commute the death sentence—which was exercised in approximately 50 percent of the cases—H. L. A. Hart commented that “indeed the death penalty would not have been tolerated at all had it been carried out in all cases where it was imposed.”⁵² In 1972, the concept of arbitrariness finally emerged as a constitutional criterion in *People v. Anderson*,⁵³ in which the California Supreme Court struck down the death penalty on almost every conceivable basis—including the infrequency of executions as an indication of public rejection of that penalty.⁵⁴ The argument, that the public acceptance of this penalty is measured by how society acts and not simply by what the law says on its face, was a mainstay in Anthony Amsterdam’s brief in *Aikens v. California*.⁵⁵

In turn, Amsterdam’s brief, written for one of the four petitioners originally before the court, became the primary stimulus for the decision in *Furman*. Although the argument had existed in fragmentary form, Amsterdam formed a coherent theory under the cruel and unusual punishment clause of the eighth amendment. Basing his theory on a wealth of factual information,⁵⁶ Amsterdam demonstrated that the death penalty had been progressively rejected by the public—covertly, if not overtly. The conclusion that followed was simply that the capital punishment statutes were tolerated by the public only so long as they were rarely applied in practice. “The distinction which we draw here lies between what public conscience will allow the law to *say* and what it will allow the law to *do*—between what public decency will permit a penal statute to threaten and what it will allow the law to carry out. . . .”⁵⁷

Drawing from English historical precedents,⁵⁸ Amsterdam ascertained that the very purpose of the eighth amendment was to prevent society from inflicting penalties on unpopular and weak minorities when that society’s standards of decency would not permit the same penalties to be imposed “uniformly, regularly, and even-handedly”⁵⁹ on the entire population of defendants convicted for the same crimes. Thus,

⁵² Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 438 (1957); see also Goldberg, *supra* note 7, at 1789.

⁵³ 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

⁵⁴ 6 Cal. 3d at 649, 493 P.2d at 894, 100 Cal. Rptr. at 166.

⁵⁵ 406 U.S. 813 (1972). *Aikens* was dismissed by the Supreme Court due to the intervening decision by the Supreme Court of California invalidating that state’s statute under the state constitution.

⁵⁶ Brief for Petitioner in *Aikens v. California*, at 26-39.

⁵⁷ *Id.* at 20.

⁵⁸ Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

⁵⁹ Brief for Petitioner at 24.

he argued, the capricious application of the death penalty violated the cruel and unusual clause of the eighth amendment and the defendants' death sentences had to be overturned.⁶⁰

As a prelude to an analysis of the individual majority opinions in *Furman*, it should be emphasized that the challenge to the death penalty in that case did not depend on the arbitrariness resulting from discretionary sentencing alone. In fact, the arguments and briefs before the court indicated that the attack was directed toward the entire criminal justice system, which is permeated with discretionary functions. A brief synopsis of the opinions of the majority will show that although some of the language stressed the discretionary sentencing problems, the main thrust was against all discretionary aspects within the system.

Though Mr. Justice Douglas relied substantially on the discrimination of the system against the blacks, he also noted the discrepancy between the laws as written and as applied. As a preface to the main portion of his opinion, he established that "what may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions."⁶¹ Using the historical argument (*i.e.*, that the clause was intended in part to prevent irregular imposition of punishments) and the evidence introduced by the petitioners, he found that it was cruel and unusual "to apply the death penalty . . . selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."⁶² Despite Mr. Justice Douglas's concern with the *sentencing* of defendants by whim or prejudice,⁶³ the policies he enunciated extend over the entire system. For instance, he indicated that a mandatory penalty would not be the answer, because it could still be selectively imposed on minorities and lower classes through the operation of all the discretion which the system allows.⁶⁴ Coupled with this concern was his determination that the legislatures must write penal laws (presumably all laws within the penal code) that are "even handed,

⁶⁰ *Weems v. United States*, 217 U.S. 349 (1910), may have both "unusual" and "cruel" in its determination. It seems, however, that the latter word was the basis for the decision in that the punishment there seemed inherently cruel to the sensibilities of the justices. Although an often-suggested test of disproportionality (*i.e.* the punishments for crime X are much greater than the punishments for other similar crimes) may rest in part on the concept of unusualness, few courts have sustained a challenge under the eighth amendment on this basis.

⁶¹ 408 U.S. at 242.

⁶² *Id.* at 245.

⁶³ Douglas mentioned as well the problems associated with the differences among the abilities of attorneys and their relationship to the system as a whole. *Id.* at 256.

⁶⁴ *Id.* at 257.

nonselective and nonarbitrary."⁶⁵ In order to have capital punishment laws that fulfill Mr. Justice Douglas's criteria, every discretionary facet of the system would have to be eliminated,

Mr. Justice Brennan formulated a four-part test under the cruel and unusual clause: (1) a punishment must not be so severe as to be degrading to the dignity of human beings; (2) the State must not arbitrarily inflict a severe punishment; (3) a severe punishment must not be unacceptable to contemporary society; (4) a severe punishment must not be excessive.⁶⁶ Although all four tests had to be met for him to declare the death penalty unconstitutional, it is sufficient for this analysis that only two of them be considered: arbitrary infliction of the punishment and society's rejection of the death sentence.⁶⁷

Mr. Justice Brennan maintained that the clause was directed, at least in part, against the arbitrary imposition of penalties for criminal conduct:

There is scant danger, given the political processes "in an enlightened democracy such as ours" that extremely severe punishments will be widely applied. The more significant function of the clause, therefore, is to protect against the danger of their arbitrary infliction.⁶⁸

On the basis of the decreasing incidence of executions in the twentieth century, he concluded that the infliction of the death penalty was so rare that it necessarily entailed a haphazard application. In conjunction with this, he noted several of the practices responsible for the rarity with which the death penalty was imposed: jury nullification, discretionary sentencing, executive clemency, and the more rigorous scrutiny exercised by the appellate courts in capital cases.⁶⁹

When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse.⁷⁰

Mr. Justice Brennan condemned all practices which allow society to impose the death penalty selectively.

Mr. Justice Stewart concurred in the judgment on the basis that there was little, if anything, to distinguish between those who were sentenced to death and those who were not. Although he confined his short analysis

⁶⁵ *Id.* at 256.

⁶⁶ *Id.* at 271-79.

⁶⁷ It is highly unlikely that Brennan would reverse his opinion that the death penalty is degrading to human dignity and that it is unnecessary to achieve appropriate penal goals.

⁶⁸ *Id.* at 277.

⁶⁹ *Id.* at 297-99.

⁷⁰ *Id.* at 300.

to those "sentenced" to die, it is not clear that he considered such discretion to be the only unconstitutional aspect of the system. Apparently, he would oppose *any* arbitrary infliction of the death penalty. "I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."⁷¹

Mr. Justice Marshall did not rely on the arbitrariness argument which underlies the opinions of Justices Douglas, Brennan and Stewart. He established four separate criteria for use in evaluating punishments under the cruel and unusual clause:

- 1) [P]unishments that involve so much physical pain and suffering that civilized people cannot tolerate them. . . .
- 2) [P]unishments that are unusual, signifying that they were previously unknown as penalties for a given offense. . . .
- 3) [A punishment that is] excessive and serves no valid legislative purpose. . . .
- 4) [A punishment which] public sentiment abhors. . . .⁷²

Marshall admitted that the first two criteria are inapposite in a consideration of the constitutionality of the death penalty. Therefore, his analysis concentrated on the latter two, and led him to the conclusion that capital punishment was clearly excessive and served no valid penal purpose.

More appropriate to the purposes of this note, Mr. Justice Marshall was convinced that the penalty was exacted against identifiable classes of people—primarily on the basis of discrimination. Accordingly, he maintained that the public would resoundingly disapprove of this penalty if it knew that it was being used against the "forlorn."⁷³ Although this conclusion is reached by a different route from that taken by the other Justices, it is sufficient to show that Mr. Justice Marshall would censure any capital punishment process which would lead to discriminatory results.

Finally, Mr. Justice White addressed the infrequency with which the penalty was imposed to illustrate that its penal purposes were not being fulfilled. He concluded that the legislature's delegation of sentencing policy to the *ad hoc* determinations of the judge and jury was an abdication by the legislature of its proper role in establishing policy.⁷⁴ This delegation had allowed the death penalty to be imposed so infrequently that the state's interests were being served only marginally—if at all.

⁷¹ *Id.* at 310.

⁷² *Id.* at 330-32.

⁷³ *Id.* at 366.

⁷⁴ *Id.* at 314.

Since the death penalty could be constitutional only if it more than marginally served a state interest, capital punishment in this system was unconstitutional. Further, any penal statutes which would either allow groups other than the legislatures to ascertain penal policies or prevent the fulfillment of legislatively determined purposes would probably be found unconstitutional under his thesis also.

In their total effect, the majority opinions manifest a variety of considerations which ultimately converge on the unconstitutionality of the death penalty. Although it can hardly be said that the opinions track one another, there is a common concern with the arbitrary infliction of the death penalty as a violation of the cruel and unusual punishments clause. As has been demonstrated earlier, the factors which lead to arbitrary infliction are the discretionary components of the criminal justice system in general and the capital punishment process in particular.

III. POTENTIAL LEGISLATIVE RE-EXAMINATION

A. *Importance of Reform*

The effect of the reforms enacted in the nineteenth century within the capital punishment scheme was to curtail any intensive legislative re-evaluation of the death penalty (with the exception of the few states that experimented with abolition). The reforms put the death sentence out of public view not only by making the executions private but also by providing many opportunities for groups and individuals to mitigate the severity of the punishment. As a result, so few actual executions took place that the public interest in the question of capital punishment became minimal. Feeling no pressure, the law-makers simply did not re-examine the statutes and the system with any thoroughness.⁷⁵ Thus, in addition to ending the many discretionary elements inherent within the system of capital punishment, the *Furman* decision also provided the necessary impetus for legislatures to re-examine the purposes and problems behind the death penalty. Indeed, some of the dissenters in *Furman* welcomed such an opportunity. For instance, Mr. Chief Justice Burger commented: "I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility to make a thorough re-evaluation of the entire subject of capital punishment."⁷⁶ Mr. Justice Blackmun indicated that this was a subject matter properly left to the legislatures. Thus he too was in favor of a thoroughgoing reform of the capital punishment process.⁷⁷

⁷⁵ Goldberg, *supra* note 7, at 1790.

⁷⁶ 408 U.S. at 403.

⁷⁷ *Id.* at 410.

Whether the legislators have been actively performing this task since *Furman*, however, is highly debatable. It appears that most legislatures, instead of undertaking thorough reform, are simply attempting to correct the unconstitutional aspects specifically mentioned in the various opinions (*i.e.* judge and jury sentencing) without looking at the entire scheme. Such an approach ignores the policies enunciated by the majority justices.

B. *Right to Have Rights—A Concept Basic to Any Capital Punishment Scheme*

In any re-evaluation of the policy determinations behind a given set of laws, it is vital to understand exactly what the ultimate decision means to those subjected to the laws. Accordingly, it will be shown here that capital punishment in essence results in the total denial of a citizen's right to have rights, and this differs drastically from any other punishment in use today. Since discretion leads to either arbitrary or discriminatory results, a punishment of such magnitude is inherently suspect when it is imposed by a discretionary system. If a legislature permits such a punishment to be imposed, it must ensure that there is no discretion in the system.

It has been submitted that capital punishment is different in kind, not just in degree, from other punishments.⁷⁸ Unlike the one who sits in the electric chair; the life prisoner (as well as all other prisoners) retains certain rights. One of these is the right to have a constitutional decision with a retroactive effect applied to his case, allowing him to glean whatever benefits he can from it. Whether one terms this a right of access to the courts or a right to maximize subsequent constitutional judgments in individual cases, the executed have lost this right completely. This is of paramount importance when the Supreme Court determines that a specific attribute of due process substantially affects the reliability of a conviction, a decision which is given retroactive effect. Only the executed have lost the right to apply such a ruling to their convictions. In fact, "it is clear that there is no reason to suppose that a right to collateral relief which could arise after a judgment is affirmed on appeal could not arise after execution of the condemned man—but for the mootness of his case."⁷⁹

In addition to the loss of this attribute of citizenship, the executed

⁷⁸ 408 U.S. at 306; see also *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 82 (1972).

⁷⁹ Note, *The Death Penalty Cases*, 56 CALIF. L. REV. v268, 1361 (1968). See also Herman, *An Acerbic Look at the Death Penalty in Ohio*, 15 CASE W. RES. L. REV. 512, 531 (1964).

loses every other right accorded to him by the Constitution. The Supreme Court has zealously safeguarded the basic freedoms, such as freedom of speech, for all other citizens. No other punishment, not even life imprisonment, specifically entails the loss of all constitutional rights. Yet it has been determined that some convicted defendants, those condemned to death, no longer should be allowed to exercise these rights. Of course, it may be said that the loss of rights is just the necessary concomitant to the loss of life and therefore irrelevant. But, on the contrary, the fact that both are forfeited by the executed illustrates the enormity of that punishment. And the enormity of a punishment itself is not an unfamiliar constitutional consideration.⁸⁰

In *Trop v. Dulles*⁸¹ the defendant was punished with denationalization for desertion in time of war—a punishment discretionary with the military authorities and actually imposed on only one-third of all deserters. Although part of the decision dealt with the severe psychological suffering that accompanied the punishment, the opinion was primarily directed towards the magnitude of the punishment:

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in development. . . . In short, the expatriate has lost the right to have rights.⁸²

Mr. Justice Brennan noted in *Furman* that the magnitude of the death penalty, which results in the total abrogation of all rights, made that punishment too "uniquely degrading to human dignity."⁸³ However, because of its "longstanding usage,"⁸⁴ he believed that this consideration alone was not sufficient to strike it down. The claim here is not that the confiscation of the right to have rights is inherently unconstitutional, however appealing that formula may be. Instead, this argument takes issue with the theory that what may be a permissible method for imposing a lesser punishment is automatically permissible for capital punishment. The two systems *may* correlate to a certain extent. But the very real substantive difference between the two underscores the fact that anomalies which are *permissible* costs in one system may be *prohibited* costs in the other. In other words, arbitrary or capricious choices of punishment can be rectified, to some extent, for every defendant except the executed one.

⁸⁰ See 408 U.S. at 309 (Stewart, J., concurring).

⁸¹ 356 U.S. 86 (1958).

⁸² *Id.* at 101-02; see also, Goldberg *supra* note 7, at 1786-87.

⁸³ 408 U.S. at 291.

⁸⁴ *Id.*

The very magnitude of the death penalty mandates that no possibility of erratic application can enter the system. Furthermore, unless the state can show a great interest in the retention of a system which entails such high costs to those random victims who are executed, the death penalty should be replaced by another system of punishment of less magnitude. If states are unable to structure a system eliminating the possibility of arbitrary application, and if the states are also unable to demonstrate a substantial justification for this penalty, they should abolish capital punishment altogether.

IV. STATUTES ENACTED SINCE FURMAN

This section will analyze the various statutes⁸⁵ passed since *Furman*, focusing on the areas in which restrictions on discretion have been formulated and the areas which thus far have been ignored by the legislatures. Generally, statutes have concentrated on revamping or eliminating the discretionary sentencing system. However, despite the various restrictions that have been enacted, the legislatures have not achieved a discretion-free system.

The statutes may be classified according to their prime characteristics: (1) statutes which purport to confer a mandatory death sentence; (2) statutes which limit the discretion of the judge or jury (or, alternatively, which narrow the range of crimes for which the death penalty may be imposed); (3) statutes which have limited the exercise of discretion. In addition, the elements which have impelled the legislature to seek the death penalty may be analyzed under four main criteria: (1) harm caused by the offense; (2) risk of harm caused by the defendant in that offense; (3) risk of future harm caused by the defendant to society; and (4) moral fault of the defendant.⁸⁶

⁸⁵ Both the South Dakota legislature and the Massachusetts legislature enacted statutes which were later vetoed by the governors. As a result, these two states have no death penalty provisions currently in force. The legislatures of Alabama, Alaska, Maine, Minnesota, and West Virginia have not yet enacted a new statute though bills were introduced (but defeated) to reinstate the death penalty. Colorado, Hawaii, Iowa, Missouri, New Jersey, Vermont, and Washington all have bills currently being considered by the legislatures. Oregon indicates that no substantial move was made to re-enact the penalty. Rhode Island changed its only statute to provide the death penalty for murders committed by any prisoner, not just a life prisoner. And South Carolina is following the lead of North Carolina and Delaware in attempting to sever the discretionary jury sentencing provisions from the statute to make a mandatory one.

⁸⁶ This procedure is partially derived from Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 636 (1966): "Punishment may be considered in relation to the harm actually resulting from a criminal act, to the risk of harm caused by the actor, to the degree of temptation he faced, or to his 'moral fault.'"

1. *Mandatory Death Sentences*

To date, nine state legislatures have passed what they consider to be mandatory capital punishment statutes: Indiana, Louisiana, Mississippi, Nevada, New Hampshire, New Mexico, Oklahoma, Tennessee, and Wyoming. These states have attempted to eliminate what was objectionable under *Furman* by moving toward the furthest pole from total discretion. At the same time, all attempts to individualize the punishment according to the offender's characteristics have been forsaken.⁸⁷ By seeking to ensure the maintenance of the death penalty through blanket coverage such as this, the legislators have made an obvious value judgment in favor of death.

Some of these statutes contain a general murder clause somewhat similar to the pre-*Furman* statutes. For example: "Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate any rape, arson, robbery or burglary . . . kills any human being guilty of murder in the first degree."⁸⁸ Other statutes simply contain an introductory phrase, with no broad definition of first degree murder. Both types of clauses are followed by a list of six to ten specific factual circumstances which would mandate the death penalty. These are primarily based on the harm caused by the offense and the future risk to society which the defendant represents. There are no separate sentencing proceedings to determine these specific circumstances. The most frequently listed circumstances indicating concern with the harm caused are:

(1) A murder of any peace officer, corrections employee, or fireman acting in the line of duty;⁸⁹

(2) Murder perpetrated in the course of a kidnapping;⁹⁰

(3) A murder committed for profit or reward of any kind by a defendant after being hired by any person, or the employment or inducement of another to commit murder;⁹¹

(4) Intentional murder by the unlawful and malicious use or detonation of any explosive;⁹²

⁸⁷ The success of the individualization principle is uncertain at best. At any rate, it has not yet become a constitutional requirement and therefore it can be sacrificed to the constitutional need for consistency. Cf. Packer, *Making the Punishment Fit the Crime*, 7 HARV. L. REV. 1071, 1078 (1964).

⁸⁸ WYO. STAT. ANN. § 6-54 (1957, as amended by Senate Act No. 50, 1973) [hereinafter indicated by the date 1973]; see also IND. CODE § 35-13-4-1 (1971) as amended (Supp. 1973); OKLA. STAT. ANN., Tit. 21, § 701.1 (1958) as amended (Supp. 1973).

⁸⁹ See, e.g., IND. CODE § 35-13-4-1 (1). (1973).

⁹⁰ See, e.g., WYO. STAT. ANN. § 6-54 (b) (vii) (1973).

⁹¹ See, e.g., WYO. STAT. ANN. § 6-54 (b)(ii) (1973).

⁹² See, e.g., WYO. STAT. ANN. § 6-54 (b)(iii) (1973).

(5) Murder in the course of the hijacking of a commercial airplane, train, bus, boat, or other commercial vehicle;⁹³

(6) Killing more than one person as the result of a common plan, scheme, or design.⁹⁴

Concern with the risk which the defendant poses to society are exemplified by:

(1) Murder by a person under a sentence of life imprisonment in the penitentiary;⁹⁵

(2) Murder committed by a person who had previously been convicted of murder in the first or second degree;⁹⁶

(3) Murder committed in the perpetration of or attempt to perpetrate a rape, arson, robbery, or burglary where the defendant had previously been convicted of rape, arson, robbery, or burglary.⁹⁷

All of the criteria enumerated above are specific in nature. Each one (except for killing by "common design") would be provable either as a matter of record (*e.g.*, prior conviction) or as one of the essential elements of the crime (*e.g.*, "murder of a police officer"). Notwithstanding this fact, Nevada, Indiana, Tennessee, and Oklahoma have specifically enacted or retained provisions either allowing or requiring the jury to specify one of the degrees of murder in its verdict: "The jury before whom any person indicted for murder is tried shall, if they find such person guilty thereof, designate by their verdict whether such person is guilty of capital murder, or murder of the first or second degree."⁹⁸ It has been noted above that the differentiation of murder into degrees has been a prime source of discretion in the capital punishment process. This kind of provision allowing the jury to designate the degree can abrogate the carefully delineated categories set out in the statute and lead to decisions by whim or caprice. Furthermore, if the use of such statutes is an attempt

⁹³ See, *e.g.*, WYO. STAT. ANN. § 6-54 (b)(viii) (1973).

⁹⁴ See, *e.g.*, NEV. REV. STAT. § 200.030-1(a)(2)(e) (1973).

⁹⁵ See, *e.g.*, OKLA. STAT. ANN. § 701.1 (7) (1973).

⁹⁶ See, *e.g.*, WYO. STAT. ANN. § 6-54 (b)(iv) (1973); IND. CODE § 35-13-4-1(5).

⁹⁷ See IND. CODE § 35-13-4-1 (7) (1973); WYO. STAT. ANN. § 6-54 (b)(vi) (1973). MISS. CODE ANN. § 97-3-65 (1972), as amended, (1974) provides a mandatory death penalty for rape of a female child under the age of 12 years.

⁹⁸ See, *e.g.*, NEV. REV. STAT. § 200.030-4 (1973). OKLA. STAT. ANN. § 703 (1973) allows greater leeway:

In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions . . . The judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial.

TENN. CODE ANN. § 39-2404 (1955) has been retained, requiring the jury to specify the degree of murder in its verdict.

to avoid the problem of jury nullification,⁹⁹ the remedy does not solve the problem. In reality, the legislature is simply substituting one form of discretion (choice of degrees) for the other (nullification by refusal to convict).

Only one statute makes any provision for prosecutorial control: Indiana prevents the prosecutor from including lesser offenses in the same indictment for first degree murder.¹⁰⁰ This leaves untouched the prosecutor's power to charge only the lesser offenses even when there is clear evidence that a first degree indictment is in order. The statutes of Tennessee and New Mexico aggravate the problem of prosecutorial discretion by simply indicating that any kind of murder not constituting a first degree offense is a second degree offense.¹⁰¹ In addition, these statutes contain felony murder provisions and premeditation clauses which are supposedly sufficient, without any narrowing provisions (such as those indicated above), to require a charge of and conviction for first degree murder. It has been shown, however, that the difficulty of identifying what premeditation is and when it exists allows the jury to convict on its own whim, while permitting the prosecutor to charge on the basis of plea bargaining or other factors.¹⁰²

Wyoming,¹⁰³ Nevada,¹⁰⁴ and Oklahoma have enacted provisions for automatic appeal after a sentence of death. Oklahoma has provided criteria for the appellate courts to use in examining the sentence:

Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crimes and the defendant.¹⁰⁵

The very existence of this section belies the mandatory nature of the statute. The extraneous factors enumerated would presumably have

⁹⁹ See Note, *Capital Sentencing—Effect of McGautha and Furman*, 45 TEMP. L.Q. 619, 27 (1972).

¹⁰⁰ IND. CODE § 35-13-4-1.

¹⁰¹ TENN. CODE ANN. § 39-2403 (1955): "All other kinds of murder shall be deemed murder in the second degree;" NEW MEX. STAT. ANN. 40A-2-1(B) (1963): "Murder in the second degree consists of all other murder."

¹⁰² LA. REV. STAT. ANN. § 14.30 and § 14.30.1 (1951), as amended (Supp. 1974) attempts to differentiate between first and second degree murders by requiring a specific intent "to kill or to inflict great bodily harm" in the first degree provision. This is of little aid, for the judgments concerning specific intent will be highly personal ones for the prosecutor as well as the jury.

¹⁰³ WYO. STAT. ANN. § 6-54 (d) (1973).

¹⁰⁴ NEV. REV. STAT. § 177.055 (1967).

¹⁰⁵ OKLA. STAT. ANN. § 705 (Supp. 1973).

been eliminated by the mandatory classification. Such a provision, therefore, is tacit recognition that a purely mandatory statute operating without discretion or abuse is impossible. As to the examination for disproportion, it is unclear how the court is to make such a determination. It is only assured of hearing those cases in which the death sentence has been imposed. In practice, the court may not (depending on the incidence of plea bargaining) have a perspective on review broad enough to perceive disproportion.

Two state legislatures, Delaware and North Carolina, have remained passive while their supreme courts adopted the simple expedient of severing discretionary jury sentencing provisions to make a mandatory statute.¹⁰⁶ Recently, the North Carolina Supreme Court upheld this mandatory punishment against a variety of attacks,¹⁰⁷ including attacks based on the impermissible existence of discretion in the executive clemency prerogative, the authority of the prosecutor, and the responsibility of the jury in choosing the degree of the crime. In each realm, the North Carolina Supreme Court refused to accept the argument that each discretionary function may allow freakish or arbitrary imposition of the punishment. In particular, the court assumed that no solicitor would select the charge on any basis other than a legal evaluation of the evidence. Moreover, the court flatly stated that no majority justice in *Furman* ever suggested that the governor's power was a discretionary act making the death penalty unconstitutional.¹⁰⁸ In summary the court stated: "If the existence of these discretionary powers makes the imposition of the death penalty unconstitutional, it would also make unconstitutional all prison terms, however long or short."¹⁰⁹

Contrary to that court's assertions, it has been shown that the death penalty is different in kind from any other punishment because of its magnitude, and that distinct criteria apply in determining its constitutionality. The capricious results of the system are not due to any one discretionary element, but to all of them combined. Likewise, the majority justices did not limit their concern to any one such element, but instead based their conclusions on the freakish application of the penalty result-

¹⁰⁶ *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973); *State v. Dickerson*, 298 A.2d 761 (Del. Supr. 1973). *Jefferson v. Commonwealth*, 15 Crim. L. Rptr. 2183 (Apr. 22, 1974), upheld Virginia's statute dealing with capital punishment for the killing of prison guards. The court confined the *Furman* rationale to sentencing discretion exercised by a jury or a judge.

¹⁰⁷ *State v. Jarrette*, 14 Crim. L. Rptr. 2469 (N. Car. Feb. 25, 1974).

¹⁰⁸ *But see* text accompanying footnotes 66-70, *supra*.

¹⁰⁹ 14 Crim. L. Rptr. at 2470.

ing from the entire operation of the capital punishment process.¹¹⁰ Thus, although these statutes have eliminated discretion in the actual sentencing process, the areas of prosecutorial discretion (including plea bargaining), executive clemency (for which change would require a state constitutional amendment) and competence of counsel are left virtually untouched. In addition, the jury is often given the prerogative of convicting for first or second degree murder in its verdict. The total effect of the statutes is to allow much of the discretion of the pre-*Furman* system to remain in the present system. This discretion can readily prevent an even-handed application of the death penalty.

B. *Statutes Narrowing the Range of Crimes or Limiting Discretion*

This category is formed by those statutes which do not permit the death penalty to be imposed unless the crime involves at least one of a number of specifically prescribed "aggravating circumstances." These aggravating circumstances, which normally are fewer than ten in number, usually consist of specific attributes of a crime. Hence the statutes limit discretion by narrowing the range of crimes for which the death penalty may be imposed.¹¹¹

All of these statutes (passed by Texas, Georgia, and California)¹¹² provide for separate sentencing proceedings in which evidence is presented by both the defendant and the prosecutor on the issue of aggravating circumstances. If the prosecutor does not charge one of the special circumstances, there is no possibility of receiving the death penalty. All of these statutes require that the findings must be beyond a reasonable doubt. Although this rule on its face seems absolute, there remains the problem of whether the judge or the jury will find that an aggravating circumstance exists. In other words, if the fact-finder does not wish to sentence

¹¹⁰ See Junker, *The Death Penalty Cases: A Preliminary Comment*, 48 WASH. L. REV. 95, 108 (1972).

¹¹¹ See Note, *Scope of Appellate Review of Sentences in Capital Cases*, 108 U. PA. L. REV. 434, 445 (1960), n.80:

A distinction must be drawn between categorical prerequisites—whereby the legislature directs that a defendant shall not be sentenced to punishment X unless the court finds that factor A is present—and considerations—whereby the legislature directs the court to consider factor B in imposing sentence. The former limit discretion; the latter guide its exercise.

¹¹² In *People v. Purcell*, 15 Crim. L. Rptr. 2001 (Mar. 6, 1974), a California superior court upheld California's new statute enacted pursuant to article I, section 27, which was approved by the California voters last year. *People v. Sims*, 15 Crim. L. Rptr. 2239 (May 8, 1974), also upheld the statute in the face of an argument similar to that suggested here. The court stated that there was a presumption that the prosecutor would exercise his powers in a proper manner. In addition, the court did not expect that a jury would disregard its duty and the court's instructions in reaching a verdict not warranted by the facts and the law.

the defendant to death, he can simply refuse to hold that any of the aggravating circumstances were present.

One commentator has concluded that any legislative effort to restrict the control of the sentencing party is "foredoomed to failure."¹¹³ Whether this statement is true or not, discretion—or potential for abuse in arbitrary sentencing—has not been effectively eliminated by these statutes, though it may have been somewhat curtailed.

Before any attempt is made to analyze some of the typical provisions of these statutory schemes, it should be noted that their general focus is negative, in that they are concerned almost exclusively with aggravating, rather than mitigating, circumstances.¹¹⁴ For instance, one such classification of circumstances focuses on the harm caused by the offense, and includes murder by hire and murder of a police officer, a witness to a crime, or a judicial officer.¹¹⁵ The Georgia statute has two provisions which focus on the *risk* of harm created by the defendant in committing the offense charged:

1) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.¹¹⁶

2) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.¹¹⁷

¹¹³ George, *Aggravating Circumstances in American Substantive and Procedural Criminal Law*, 32 U. MO. K.C. L. REV. 14, 27 (1964).

¹¹⁴ An exception is CAL. PENAL CODE § 190.3 (West Supp. 1974):

(a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of 18 years at the time of the commission of the crime.

(b) [Except for murder for hire] . . . the death penalty shall not be imposed upon any person who is a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death, and directly committed or physically aided in the commission of such act or acts.

California has specifically retained a mandatory death sentence for three crimes: kidnapping where death of the victim occurs (CAL. PENAL CODE § 209 (West, Supp. 1974)); train wrecking where death of a victim occurs (CAL. PENAL CODE § 219 (West, Supp. 1974)); assault by a life prisoner on a corrections official where death results within one year (CAL. PENAL CODE § 4500 (West, Supp. 1974)).

¹¹⁵ GA. CODE ANN. § 27.2534.1 (1972), *as amended*, Ga. Laws No. 74 (1973) (hereinafter indicated by the date 1973) has some additional provisions relating to murder during an escape or during the prevention of a lawful arrest. Georgia also allows total discretionary sentencing for the offenses of treason and aircraft hijacking in that the restrictions for other capital crimes are not applicable to these crimes.

¹¹⁶ GA. CODE ANN. § 27.2534.1 (b)(2) (1973).

¹¹⁷ GA. CODE ANN. § 27.2534.1 (b)(3) (1973).

The latter provision allows discretion in the sentencing determination through its vague wording (*e.g.*, what constitutes "knowingly creat[ing] a great risk of death"). California has a catch-all provision for a willful, deliberate and premeditated murder in the commission of any one of five felonies.¹¹⁸ This is, in fact, so broad that it is questionable whether California has actually narrowed the range of crimes at all. Beyond this, the jury's difficulty in determining the existence of premeditation indicates that this aggravating circumstance could easily permit capricious results.

Both Georgia and California have provisions designed to include those defendants who are a risk to society. California chose the standard of more than one conviction of murder¹¹⁹ (a readily applicable criterion) while Georgia opted for a more malleable standard: "The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions."¹²⁰

It is probable that the last phrase of the statute can be manipulated by the prosecutor, judge, or jury in accordance with their belief whether or not capital punishment is appropriate for a particular defendant. The standard does provide some guidance in that it requires an examination of the defendant's criminal history. However, it leaves open for interpretation the question of how to evaluate the defendant's individual history in a manner consistent with the statutory intent.¹²¹

Finally, only Georgia has a criterion which represents a judgment based on the moral state of the defendant: "The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."¹²² This standard is evidently intended to include those defendants who do not fit into another category and who *might* be unfit to live from the viewpoint of the jury. In practice, this provision might be apropos in a great number of cases, but its

¹¹⁸ CAL. PENAL CODE § 190.2(b)(3) (Supp. 1974).

¹¹⁹ CAL. PENAL CODE § 190.2(b)(4) (Supp. 1974).

¹²⁰ GA. CODE ANN. § 27.2534.1 (b)(1) (1973).

¹²¹ At this juncture, a brief examination of TEX. CODE CRIM. PROC. ANN. art. 37.071 (Supp. 1974) will show that while attempting to follow a format similar to California and Georgia, Texas made some significant changes. Texas requires that each of its three aggravating circumstances be found true in order to impose the death penalty. To some extent, therefore, it evinces a policy in favor of life imprisonment since the very number of threshold questions theoretically would make it more difficult to impose the death sentence. Nevertheless, Texas has phrased the criteria in terms of reasonableness and probability—words that allow the full range of jury's reactions to influence its determination.

¹²² GA. CODE ANN. § 27.2534.1 (b)(7) (1973).

vague and pliable terminology allows the jury substantial freedom in applying it to defendants.

All of these statutes provide for jury determination of the penalty. The Georgia statute mandates that if the jury cannot make a unanimous decision, it shall be discharged and a sentence of life imprisonment is to be imposed by the judge.¹²³ California requires that only after a second jury cannot choose the penalty unanimously is the judge to impose a life sentence.¹²⁴ Texas, California, and Georgia all require an automatic review by an appellate court, presumably to examine the punishment as well as the conviction. Georgia has detailed three criteria for use by its supreme court in reviewing the sentence:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Code section 27-2534.1(b); and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.¹²⁵

With regard to this last provision, the statute requires that the supreme court make an adequate comparison with similar cases and include such references in its decision. But whether the supreme court is actually capable of adequately comparing similar cases (including those that were opted out of the process through plea bargaining) is highly questionable.¹²⁶ Moreover, an efficacious perusal of the evidence is dependent on the court's attitude toward juries: it may either be disposed toward affirming most convictions and sentences, or it may decide to interfere frequently on the basis of its own whim. Finally, the first criterion, that of avoiding passion or prejudice, was evidently inserted to counteract the sentencing standard dealing with the defendant's "depravity of mind." The inclusion of such a criterion as a check on the jury indicates the problematical aspects of a discretionary standard. Whether the criteria established for the supreme court effectively curtail the jury's discretion is debatable. It is more likely that the review procedure simply injects another discretionary stage into the system.¹²⁷

Thus these statutes which narrow the range of crimes for which the

¹²³ GA. CODE ANN. § 26.3102 (1973).

¹²⁴ CAL. PENAL CODE § 190.1 (Supp. 1974).

¹²⁵ GA. CODE ANN. § 27-2537(c) (1973).

¹²⁶ See GLUECK, *Predictive Devices and the Individualization of Justice*, 23 LAW & CONT. PROB. 461, 466 (1958), where the author indicates that appellate review could impose only a "superficial uniformity" at best.

¹²⁷ Cf. Note, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1434-41 (1968).

death penalty can be imposed leave wide gaps in the sentencing process. There are no provisions dealing with prosecutorial discretion. Considering the few broad categories enumerated by the statutes, the prosecutor's power is virtually unlimited. In addition, executive clemency, as a constitutional prerogative, has not been dealt with at all. Similarly, the problems involved with the competency of counsel have remained, since the legislatures seem powerless to relieve them. Finally, it seems clear that, even under a procedure which requires it to focus on a specific catalogue of aggravating circumstances, the jury itself may continue to exercise a great deal of discretionary power.

C. *Limiting the Exercise of Discretion*

The eight statutes limiting the exercise of discretion direct the deliberations within the sentencing process while allowing the fact-finder to measure the significance of each factor in relation to the individual defendant.¹²⁸ This combination of goals indicates an attempt on the part of the legislature to obtain a maximum individualization of punishment. Thus, although the legislatures can claim that some regularity has been imposed on the sentencing procedure, the juxtaposition of aggravating and mitigating circumstances allows the jury and the judge substantial discretion in their responsibility for determining the applicability of any of these circumstances. Arizona, Florida, Illinois, Montana,¹²⁹ Nebraska, Ohio, Pennsylvania, and Utah have passed statutes embodying the main characteristics of this category.¹³⁰

It appears that the factors set out in the statutes are specifically worded when the legislature intended to restrict discretion and ambiguously formulated when the legislature did not want to curtail to any great extent the power exercised by the fact-finder. Thus the aggravating circumstances tend to be more specific than the mitigating ones. The most common aggravating circumstances subsumed by the category of harm caused by the offense are:

- (1) The murder was committed for hire, or for pecuniary gain,

¹²⁸ See George, *Aggravating Circumstances in American Substantive and Procedural Criminal Law*, 32 U. MO. K.C. L. REV. 14, 30 (1964).

¹²⁹ It is doubtful whether Montana intended to comply with the settled law (*i.e.* jury/judge sentencing discretion) arising from *Furman*, not to mention the policy behind that legislature's decision. MONT. REV. CODES ANN. § 94-5-105 (1973) lists six circumstances for which the death penalty is to be imposed "unless there are mitigating circumstances." The Comment exalts the latter phrase as a "humanistic escape valve"—an idea which is hardly in line with the Supreme Court's judgment that the historical device for injecting mercy into the system had run its course as a constitutional technique.

¹³⁰ Many of these statutes are derived from MODEL PENAL CODE § 201.6 (Tent. Draft No. 10, 1959).

or the defendant hired another to commit the murder for the defendant.¹³¹

(2) The victim was a law enforcement officer or a public servant having custody of the offender or another.¹³²

(3) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery or aggravated burglary.¹³³

(4) The death of the victim occurred while defendant was engaged in the hijacking of an aircraft.¹³⁴

Within the category of the risk caused by the defendant in the particular crime, the following aggravating circumstances are apt illustrations of the difference between specific and general phraseology:

(1) At the time the murder was committed, the offender also committed another murder.¹³⁵

(2) In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.¹³⁶

A number of fact patterns could arguably fit within the latter category. The words "knowingly" (necessitating proof of intent) and "grave risk" (calling for a personal estimation) do little to separate those who should or consistently will be within this category from those who should not or will not be so classified. Although the latter category covers a broader spectrum (a legitimate legislative determination perhaps) than the standard of commission of more than one murder, it only does so by depending on the fact-finder's discretion.

These statutes also contain standards which indicate a concern with the risk the defendant poses towards society, making it an aggravating

¹³¹ NEB. REV. STAT. § 28-417-8 (1)(c), *as amended*, Leg. Bill 268 (1973) [hereinafter 1973].

¹³² NEB. REV. STAT. § 28-417-8 (1)(g) (1973).

¹³³ OHIO REV. CODE ANN. § 2929.04 (A)(7) (Page Special Supp. 1973). This provision functions as a broad category which would include a large percentage of all offenders.

¹³⁴ PA. STAT. ANN. tit. 18, § 1311(d)(1)(iv) (1974).

¹³⁵ NEB. REV. STAT. § 28-417-8 (1)(e) (1973).

¹³⁶ ARIZ. REV. STAT. ANN. § 13-454 (E)(3) (Supp. 1973). Utah has a very similar provision in its first degree murder statute which should be contrasted with its second degree murder criteria in UTAH CODE ANN. § 76-5-203 (1953), *as amended* (Supp. 1973): "Intending to cause serious bodily injury to another, he commits an act clearly dangerous to human life that causes the death of another . . ." While it is true that Utah has a general murder clause for first degree offenses (as do most of the states) with language about intention or premeditation prior to the listing of the aggravating circumstances, that language is insufficient to distinguish between these two criteria in practice. In fact, Utah has blended these portions of its first and second degree murder statutes so carefully that one wonders whether the legislature was purposefully retaining prosecutorial discretion.

circumstance for the offender to have: (1) previously been convicted of first or second degree murder;¹³⁷ (2) a substantial history of serious assaultive or terrorizing criminal activity.¹³⁸ Again, the specificity of the first example effectively guides a judge's or jury's determination. The second merely indicates an area of general concern and provides no control over the personal reactions or criteria brought to bear by the trier of fact.

Finally, despite the broad reach of these other categories, Arizona, Florida, and Nebraska found it necessary to add sections relating to the moral state of the defendant: (1) "The capital felony was especially heinous, atrocious or cruel";¹³⁹ (2) "The murder was especially heinous, atrocious, cruel or manifested exceptional depravity by ordinary standards of morality and intelligence."¹⁴⁰ Although the inclusion of the last phrase, "by ordinary standards," may limit the exercise of discretion, the concepts of heinousness and cruelty will undoubtedly vary a great deal among jurymen. This too is a catch-all category for those who do not fit elsewhere in the scheme.

The mitigating circumstances are cast in language at the opposite end of the spectrum from the aggravating ones.¹⁴¹ As to the harm caused by the offense, the only applicable standard is one of minor participation in a felony murder.¹⁴² The primary standard relating to the risk of harm caused by the offense is: "He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."¹⁴³

The category which focuses on the risk to society posed by the defendant is more comprehensive and includes some of the following standards: (1) "The victim was a participant in the defendant's conduct or consented to the act";¹⁴⁴ (2) "The offender acted under unusual pressures

¹³⁷ UTAH CODE ANN. § 76-5-202 (1953), *as amended* (Supp. 1973)

¹³⁸ NEB. REV. STAT. § 28-417-8 (1)(a) (1973).

¹³⁹ FLA. STAT. ANN. § 921.141 (6) (h) (1972), *as amended*, (Supp. 1973) Another indication of Florida's attitude toward the death penalty is that it allows that sentence to be imposed on rapists of children under the age of 11 (FLA. STAT. ANN. § 794.01), which is in contrast to its avowed purpose of "taking a life only when a life is taken." (Comment, § 805.02).

¹⁴⁰ NEB. REV. STAT. § 28-41-8 (1)(d) (1973).

¹⁴¹ ILL. ANN. STAT. ch. 38 § 5-8-1A (Smith Hurd 1974) provides that the decision be made by a three-judge panel who should determine that there are compelling reasons for mercy. The panel is evidently free to consider whatever factors it alone deems appropriate.

¹⁴² *See, e.g.*, NEB. REV. STAT. § 28-417-8 (2)(e) (1973).

¹⁴³ ARIZ. REV. STAT. ANN. § 13-454(F) (4) (Supp. 1973).

¹⁴⁴ NEB. REV. STAT. § 28-417-8 (2) (f) (1973). (The criterion of victim participation

or influences or under the domination of another person";¹⁴⁵ (3) "The offender has no significant history of prior criminal activity"¹⁴⁶ The inclusion of criteria which require the jury to distinguish between *significant* criminal history (mitigating circumstance) and *substantial* criminal history (aggravating circumstance) indicates a serious erosion of the attempt to curtail discretion. Between these two standards, there is a substantial gray area where the facts may be juggled and arbitrarily applied by the fact-finder.

Finally, the mitigating circumstances concerning the defendant's moral condition are very broad: (1) "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired";¹⁴⁷ (2) "[T]he youth of the defendant at the time of the crime";¹⁴⁸ (3) "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."¹⁴⁹ These criteria are an obvious escape mechanism for a jury which does not wish, for whatever reason, to sentence a defendant to death. Moreover, there is no effective way of requiring the jury to actually consider and apply these criteria.

In addition, these standards allow the introduction of evidence which could prove either an aggravating circumstance (e.g., depravity of mind) or a mitigating circumstance (e.g., emotional disturbance).¹⁵⁰ Since reasonable men could be persuaded by either one of these alternatives, the ultimate sentence will depend on the luck of the draw. A sentencing system dependent on such a variable is very likely to culminate in arbitrary and freakish determinations.¹⁵¹

The imposition of the sentence under this type of statute, always occurs upon the conclusion of a separate sentencing proceeding in which evidence is presented on the circumstances enumerated. The guidelines for weighing the aggravating and mitigating circumstances, how-

seems to indicate that a co-felon's life is not worth as much (or should not be so protected) as that of a bank teller).

¹⁴⁵ NEB. REV. STAT. § 28-418 (2)(b) (1973).

¹⁴⁶ NEB. REV. STAT. § 28-417 (2)(a) (1973).

¹⁴⁷ FLA. STAT. ANN. § 921.141 (7)(f) (Supp. 1973).

¹⁴⁸ UTAH CODE ANN. § 76-3-207 (1)(a)(e) (Supp. 1973).

¹⁴⁹ UTAH CODE ANN. § 76-3-207-1 (b) (Supp. 1973).

¹⁵⁰ See also Note, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1434 (1968).

¹⁵¹ One discretionary facet that all the statutes (with the exception of Utah) have avoided is an open-ended listing of either aggravating or mitigating circumstances. Most of the states specifically state that the aggravating (or mitigating) circumstances "shall be the following." This specification not only focuses the jury's or judge's deliberations but also provides a definite background for appellate court review. See generally Note, *Capital Sentencing—Effects of McGauth and Furman*, 45 TEMP. L. Q. 619, 631 (1972); *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & C. 2 (1973); Note, *The Two Trial System in Capital Cases*, 39 N.Y.U. L. REV. 51, 73 (1964).

ever, are less than clear-cut. The usual consideration is whether "there are insufficient mitigating circumstances to outweigh the aggravating circumstances,"¹⁵² or language to the effect. Whether the mitigating circumstances outweigh the aggravating ones is entirely dependent on the individual conceptions of the jurors and judges. Though appellate courts may attempt to institute some consistency in this area, an even-handed application may still not occur since it is doubtful that those receiving life sentences would appeal that portion of the decision.

Nebraska has put forth a more lenient standard in that it is sufficient if the mitigating circumstances "approach or exceed the weight given to the aggravating circumstances."¹⁵³ Nevertheless, similar discretionary possibilities are inherent in this proviso. Ohio and Pennsylvania have the clearest formulation in that they mandate that even *one* mitigating circumstance found as a fact precludes the imposition of the death penalty.¹⁵⁴

Arizona, Illinois, Nebraska, and Ohio provide that the sentence be imposed by the judge.¹⁵⁵ Florida has opted for a jury advisory opinion with a judicial decision,¹⁵⁶ while Pennsylvania and Utah¹⁵⁷ allow the jury to choose the sentence. In most states, the normal rules of evidence are suspended, so that almost *any* evidence will be permitted as long as the defendant has an opportunity to rebut it.¹⁵⁸ On the other hand, only the Arizona, Illinois, and Pennsylvania statutes indicate where the burden of proof lies,¹⁵⁹ and only Illinois, Ohio, and Pennsylvania indicate what that burden is.¹⁶⁰ The additional factors introduced by the type of evidence and the burden of proof and persuasion are beyond the scope of

¹⁵² FLA. STAT. ANN. § 921.141 (3) (Supp. 1974). The drafters of the Model Penal Code indicated a definite preference for the balancing process that is entailed by this language. MODEL PENAL CODE § 201.6, Comment (Tent. Draft No. 10, 1959).

¹⁵³ NEB. REV. STAT. § 28-417 (1973).

¹⁵⁴ OHIO REV. CODE ANN. § 2929.04 (B); (Page Special Supp. 1973), PA. STAT. ANN. tit. 18, § 1311(c) (Supp. 1974).

¹⁵⁵ ARIZ. REV. STAT. ANN. § 13-454 (A) (Supp. 1973); NEB. REV. STAT. § 28-417-7 (1973); OHIO REV. CODE ANN. § 2929.03 (C) (Page Special Supp. 1973).

¹⁵⁶ FLA. STAT. ANN. § 921.141 (2) (Supp. 1974).

¹⁵⁷ PA. STAT. ANN. tit. 18, § 1311 (c) (1974). UTAH CODE ANN. § 76-3-207 (Supp. 1973).

¹⁵⁸ See, e.g., FLA. STAT. ANN. § 921.141 (1) (Supp. 1974).

¹⁵⁹ ARIZ. REV. STAT. ANN. § 13-454 (B) (Supp. 1973); PA. STAT. ANN. tit. 18, § 1311(c) (Supp. 1974). The prosecutor has the burden for the aggravating circumstances and the defendant for the mitigating circumstances; ILL. ANN. STAT. ch. 38 § 5-8-1A (Supp. 1974), where the state has the burden for the aggravating circumstances.

¹⁶⁰ OHIO REV. CODE ANN. § 2929.03 (E) (Page Special Supp. 1973); PA. STAT. ANN. tit. 18, § 1311(c) (Supp. 1974), where the mitigating circumstances must be proved by the defendant by a preponderance of the evidence. ILL. ANN. STAT. ch. 38 § 5-8-1A (Supp. 1974); PA. STAT. ANN. tit. 18, § 1311 (c) (Supp. 1974), hold that the state has the burden of proving the aggravating circumstances beyond a reasonable doubt.

this paper. It is sufficient to note that these considerations can make a great deal of difference in the outcome of the sentencing process.¹⁰¹ Finally, most of the states provide for automatic appeal for review of the sentence and conviction—a minimal safeguard for controlling judge and jury abuse of the sentencing authority.

This section of the note has concentrated almost exclusively on statutes dealing with the sentencing process, and on the discretionary elements of the process which these statutes have either created or failed to eliminate.¹⁰² It should be noted, however, that irregular application of the death penalty resulting from the discretion of the prosecutor, varying competence of the counsel, and executive clemency also remain within the system.

V. CONCLUSION

The statutes passed so far by the legislatures may comply with the letter of the law in *Furman*—but certainly not the spirit. No statute effectively abrogates the discretion of the sentencing authorities and few even attempt to abate other discretionary aspects of the criminal justice system. Although some thought has evidently gone into the determination of what crimes should carry the death penalty (*e.g.*, most statutes have eliminated the so-called "passion murder" from the repertoire), the inclusion of broad and wide-ranging clauses shows that little intensive study of the capital punishment system was undertaken prior to this kind of legislation.

Although this note has stressed the inability of either the judge or the jury to be an unbiased and consistent sentencing agent, there have been no aspersions cast upon the capabilities of the jury and the judge as fact-finders in other phases of the criminal system. The legal and moral issues coupled with the emotional reactions of the sentencing officials (whether they feel pity or disgust) involved in the selection of the death penalty make a uniform application of that punishment well nigh impossible. Because of the drastic nature and magnitude of the death penalty, the potential and actual inability of the triers of fact and the other

¹⁰¹ See generally, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & C. 2 (1973); Note, *The Two Trial System in Capital Cases*, 39 N.Y.U. L. REV. 50 (1964); Note, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1404 (1968); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

¹⁰² See, Hall, *Reduction of Criminal Sentences on Appeal*, 67 COLUM. L. REV. 521, 762 (1973), where the author demonstrates that appellate review has not reduced the disparity of sentences among convicted criminals.

¹⁰³ Goldberg, *supra* note 8, at 1794. See also, M. MELTSNER, *CRUEL AND UNUSUAL* 301 (1937), for his opinion that the Court will not accept such statutes as an "experiment at the price of human life."

authorities within the criminal justice system to ensure a non-arbitrary application of that punishment demands that all capital punishment be declared unconstitutional under the cruel and unusual punishments clause.

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